



1 also known as, IMMERSE, LLC, doing )  
2 business as DERBYWARS, and Does 1 )  
3 through 10, )  
4 Defendants. )

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6 Plaintiffs Los Angeles Turf Club, Incorporated, Los Angeles Turf Club II, Inc.,  
7 Pacific Racing Association, Pacific Racing Association II, Gulfstream Park Racing  
8 Association, Inc., Oregon Racing, Inc., Maryland Jockey Club Of Baltimore City, Inc.,  
9 and Laurel Racing Association, Inc. (collectively, "Plaintiffs"), hereby submit their  
10 Memorandum of Contentions of Fact and Law, pursuant to Local Rule 16-4 and the  
11 Court's Standing Order, Exhibit B, Section (1)(B)(2).  
12  
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14  
15  
16

17 DATED: May 26, 2017

Respectfully submitted,

18 CORBETT, STEELMAN & SPECTER  
19 A Professional Law Corporation

20  
21 By: */s/ Richard B. Specter*  
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23 Attorneys for PLAINTIFFS  
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**MEMORANDUM OF CONTENTIONS OF FACT AND LAW**

Pursuant to Local Rule 16-4, and the Court's Standing Order, Exhibit B, Section (1)(B)(2), Plaintiffs submit their Contentions of Fact and Law:

**I. CLAIMS AND DEFENSES (LOCAL RULE 16-4.1).**

On May 15, 2017, this Court granted in part Plaintiffs' Motion for Partial Summary Judgment (and denied Defendant's Motion of Summary Judgment), finding that:

"Having determined that Derby Wars entry fees constitute a wager, where such wagers are placed with Derby Wars in Kentucky, with respect to the outcome of a horserace, or series of up to six individual horseraces, as the case may be, taking place in California, Oregon, Maryland, and/or Florida, and where such wagers are received over the internet, the Court concludes that Defendants are operating an off-track betting system subject to the Interstate Horseracing Act. *See* 15 U.S.C. § 3002(7). As such, the Court **GRANTS** Plaintiffs' Motion for Partial Summary Judgment as to their IHA claim.

...

"The Court finds: the entry fees paid in contests offered by Defendant on its Derby Wars website are wagers under the Interstate Horseracing Act of 1978; Defendant is operating an off-track betting system as defined in Section 3002(7) of the IHA; and the IHA can serve as a predicate for a California Business and Professions Code Section 17200 claim." Docket, No. 88.

**A. Plaintiffs' Claims.**

**1. Claim One – Violation of the *Interstate Horseracing Act of 1978*, 15 U.S.C §§ 3001, *et seq.***

The Court has already determined that Defendant is "operating an off-track betting system subject to the Interstate Horseracing Act. *See* 15 U.S.C. § 3002(7). As such, the Court **GRANTS** Plaintiffs' Motion for Partial Summary Judgment as to their IHA claim." What remains for trial is that the Court must determine whether any of



Defendant's equitable affirmative defenses bar Plaintiffs' claim for damages, and if not, thereafter a trial on the amount of Plaintiffs' damages. Plaintiffs also seek a Permanent Injunction, which is also an issue for the Court to determine. As discussed below, Defendant utterly lacks factual evidence to support any affirmative defense, nor is there legal support for Defendant's theories.

**a. Plaintiffs' Damages.**

Plaintiffs will establish their damages and their entitlement to the fees to which they are entitled under the IHA, Sections 3005 (1) and (2), with lay and expert testimony based upon, in part, the financial documents produced by Defendant and Defendant's own expert's quantification. Plaintiffs' damages through January 31, 2017 (when the Expert report was prepared in compliance with the Court deadline) are as follows:

- Under Section 3005(1) – \$2,950,111
- Under Section 3005(2) – \$1,397,145

Evidence will also be presented at trial setting forth Plaintiffs' additional damages from February 1, 2017, to the time of trial. In addition, Plaintiffs are entitled to prejudgment interest on their damages as follows: Golden Gate and Santa Anita at 10%; Portland Meadows at 9%; Pimlico and Laurel at 10%; and Gulfstream and Gulfstream West at 4.75%.

**2. Claim Two – Violation of California *Business & Professions Code* Sections 17200, *et seq.* (the “UCL”).**

The Court has already found that:

“The entry fees paid in contests offered by Defendant on its Derby Wars website are wagers under the Interstate Horseracing Act of 1978; Defendant is operating an off-track betting system as defined in Section 3002(7) of the IHA; and the IHA can serve as a predicate for a California Business and Professions Code Section 17200 claim.”  
Docket, No. 88.

1 Under the UCL, the only remaining issue is Plaintiffs' entitlement to a  
2 permanent injunction, which should issue if liability is established and there is a threat  
3 of continuing violations.

4 **B. Defendant's Affirmative Defenses to Be Tried by the Court.**

5 Defendant asserted 19 affirmative defenses in its Answer to the operative First  
6 Amended Complaint. Docket, No. 34. At the Rule 16 meeting of counsel on May 17,  
7 2017, *Defendant stated that it intended to pursue all of the Affirmative Defenses set*  
8 *forth in its Answer*; therefore, they are all addressed below. However, many of the  
9 Affirmative Defenses asserted by Defendant have been obviated by the Court's prior  
10 rulings, including the Court's Order on the Motion for Judgment on the Pleadings,  
11 (Docket, No. 43), and the Court's Order on Plaintiffs' Motion for Partial Summary  
12 Judgment. Docket, No. 88.

13 Affirmative defenses, such as equitable estoppel, laches, waiver and unclean  
14 hands, are equitable defenses.<sup>1</sup> It is for the Court to determine Defendant's affirmative  
15 defenses. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 962 (9th Cir. 2001). However,  
16 Defendant cannot prevail on any of its equitable defenses because "*he who comes*  
17 *into equity must come with clean hands*," *Hermes Int'l v. Lederer de Paris Fifth Ave.,*  
18 *Inc.*, 219 F.3d 104, 107 (2d Cir. 2000) (quoting *Precision Instrument Mfg. Co. v. Auto.*  
19 *Maint. Mach. Co.*, 324 U.S. 806, 814, 89 L. Ed. 1381, 65 S. Ct. 993 (1945))." *Danjaq*  
20 *LLC v. Sony Corp.*, 263 F.3d 942, 956 (9th Cir. 2001).

21 The Court has already determined that Defendant is subject to the IHA. It is  
22 undisputed that Defendant is not "in strict compliance" with the IHA. Thus,  
23 Defendant is in violation of the *Federal Wire Act*, 18 U.S.C. § 1084, as well as the  
24

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25 <sup>1</sup> *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085 (C.D. Cal. 2016);  
26 *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.  
27 App. 4th 54; *Oakland Raiders v. Oakland-Alameda Cty. Coliseum, Inc.*, 144 Cal. App.  
28 4th 1175 (2006); *Mihara v. Dean Witter & Co.*, 619 F.2d 814 (9th Cir. 1980).

1 *Illegal Gambling Business Act of 1970*, 18 U.S.C. § 1955. It is inconceivable that  
2 Defendant – who is violation of numerous federal and state statutes – is entitled to  
3 invoke equity to defeat Plaintiffs’ claims for violation of the IHA and violation of the  
4 UCL.

5 **1. Failure to State a Claim.**

6 The Court has already determined that Plaintiffs have stated a claim under both  
7 the IHA and the UCL. See, Docket, Nos. 43 and 88.

8 **2. Failure to Plead Claims With Required Specificity.**

9 The Court has already determined that Plaintiffs have stated a claim under both  
10 the IHA and the UCL. See, Docket, Nos. 43 and 88.

11 **3. Statute of Limitations.**

12 Section 3006 of the IHA provides a three year statute of limitations. Defendant  
13 contends that Plaintiffs’ lawsuit was not filed within the time set by law. To succeed  
14 on this defense, Defendants must prove that Plaintiffs’ only claimed harm occurred  
15 before December 2, 2012, 3 years before this lawsuit was filed. *CACI* 454. However,  
16 Plaintiffs have limited their claim for damages to those accruing from January 1, 2013  
17 to the present, which are based on Contests conducted by Defendant on or after  
18 January 1, 2013. Although the IHA, in Section 3006(c), actually permits a longer  
19 period (based upon when the violation was actually discovered), Plaintiffs are not  
20 seeking to assert such delayed discovery to extend past the 3 year statute of limitations  
21 from when the violation occurred.

22 When the wrongful conduct is recurring, as in the instant case, “[e]ach wrong  
23 gives rise to a discrete ‘claim’ that ‘accrue[s]’ at the time the wrong occurs. In short,  
24 each infringing act starts a new limitations period.” *Petrella v. MGM*, 572 U.S. \_\_\_,  
25 134 S.Ct. 1662, 1669 (2014). Separately accruing harm is distinct from “harm from  
26 past violations that are continuing.” *Id.* Every time that Defendant used Plaintiffs’  
27 horseraces in a Contest – and Plaintiffs operate horserace meets year round, and  
28 Defendant used Plaintiffs’ races in 20 – 25 percent of its contests - Defendant violated

the IHA, and caused new and distinct damage to Plaintiffs. Each such Contest is a separate violation of the IHA.

“When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period. Because each new breach of such an obligation provides all the elements of a claim — wrongdoing, harm, and causation — each may be treated as an independently actionable wrong with its own time limit for recovery.” *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1199 (2013). Thus, each Contest in which Defendant used Plaintiffs’ races without Plaintiffs’ consent creates a new cause of action against Defendant.<sup>2</sup>

#### 4. Laches.

Because Plaintiffs are within the applicable statute of limitations set forth in 15 U.S.C. §3006, laches cannot be invoked to bar their claims: “[I]n the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.” *Petrella v. MGM*, 134 S. Ct. 1629, 1644 (2014).

In addition, laches require “(1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 822 (9th Cir. 1980); *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1208 (9th Cir. 1970). There must be evidence of prejudice resulting from plaintiff’s delay in bringing the action or a defense on laches is dismissed as a matter of law. *Mihar, infra*. “The damage to the party asserting the defense is caused

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<sup>2</sup> This is not an instance where a defendant published a single defamatory article, and plaintiff’s damages increased by each occasion when additional people read that article. In such a case, the statute of limitations would run from that single publication. The instant case is analogous to the situation where a defendant published a different defamatory article on a regular basis. Each such publication would be a new wrongful act, triggering a new limitations period. Each Contest herein without Plaintiffs’ consent is a separate violation of the IHA, triggering a new statute of limitations for that specific violation.

1 by his detrimental reliance on his adversary's conduct.” *Hecht, infra; Royal Air*  
2 *Properties, Inc. v. Smith*, 333 F.2d 568, 570 (9th Cir. 1964). Defendant must show  
3 laches would apply to each violation of the IHA.

4 Defendant cannot show any detrimental reliance on Plaintiffs’ conduct.  
5 Defendant claims that Plaintiffs delayed unreasonably in filing this suit, because  
6 allegedly Midland has openly spoken about Derby Wars’ fantasy contests since 2011:  
7 “Derby Wars is informed and believes that Scott Daruty and other Stronach Group  
8 executives attend the Global Symposium on Racing and Gaming conference every  
9 year. Mark Midland spoke extensively about online contests at the December,  
10 2011 conference.” As will be shown at trial, a review of the actual transcript and the  
11 PowerPoint Presentation shows that at no time did Midland reveal that Defendant was  
12 offering pay-to-play handicapping contests at Derby Wars, much less with Plaintiffs’  
13 races in the Contests. Moreover, Defendant relied not upon any action or inaction by  
14 Plaintiffs, but rather upon its own legal counsel’s express advice that it did not need  
15 Plaintiffs’ consent to use their races because Defendant was not accepting bets or  
16 wagers.

## 17 **5. No Standing.**

18 As set forth in the Court’s Order denying the Motion for Judgment on the  
19 Pleadings (Docket, No. 43), and the Court’s Order Granting in Part Plaintiffs’ Motion  
20 for Partial Summary Judgment (Docket, No. 88), the Court has determined that  
21 Plaintiffs have standing under the IHA and UCL.

## 22 **6. No Damages.**

23 Defendant claims that: “The FAC is barred because Plaintiffs have no right to  
24 the amounts sought in the FAC and/or have suffered no injury as a result of  
25 Defendant’s actions.” This is not a proper affirmative defense. A true affirmative  
26 defense raises matters outside scope of plaintiff’s *prima facie* case and such matters  
27 are not raised by negative defense. *Instituto Nacional de Comercializacion Agricola*  
28 *(Indeca) v. Continental Illinois Nat'l Bank & Trust Co.*, 576 F Supp 985 (N.D. Ill.

1 1983). Issues raised by denial are not proper affirmative defenses. *Id.* Plaintiffs will  
2 establish their damages and the amount of the statutory fees to which they are entitled  
3 to under the IHA, Sections 3005 (1) and (2), with expert and lay testimony based  
4 upon, in part, the financial documents produced by Defendant.

5 **7. Failure to Mitigate.**

6 Plaintiffs will establish their damages and their entitlement to the statutory fees  
7 to which they are entitled to under the IHA, Sections 3005 (1) and (2), with expert and  
8 lay testimony based upon, in part, the financial documents produced by Defendant.  
9 Plaintiffs need not show any actual harm to their business to recover damages under  
10 the IHA. And under the IHA, there is no right to an offset for perceived benefits to  
11 Plaintiffs from Derby Wars' actions.

12 **8. Good Faith.**

13 The Court,

14 “Having determined that Derby Wars entry fees constitute a wager,  
15 where such wagers are placed with Derby Wars in Kentucky, with  
16 respect to the outcome of a horserace, or series of up to six individual  
17 horseraces, as the case may be, taking place in California, Oregon,  
18 Maryland, and/or Florida, and where such wagers are received over the  
19 internet, the Court concludes that Defendants are operating an off-track  
20 betting system subject to the Interstate Horseracing Act. *See* 15 U.S.C. §  
3002(7). As such, the Court **GRANTS** Plaintiffs' Motion for Partial  
Summary Judgment as to their IHA claim.

21 There is no intent requirement under the IHA, and Defendant's alleged good faith is  
22 not a defense.

23 **9. Waiver.**

24 “Waiver is the intentional relinquishment of a known right after full knowledge  
25 of the facts and depends upon the intention of one party only. Waiver does not require  
26 any act or conduct by the other party.’ Thus, ‘[t]he *pivotal* issue in a claim of waiver is  
27 the intention of the party who allegedly relinquished the known legal right.’” *Oakland*  
28 *Raiders v. Oakland-Alameda Cty. Coliseum, Inc.*, 144 Cal. App. 4th 1175, 1189-90



(2006). The “clear and convincing” standard applies “particularly” to rights favored in the law; however, it does not apply exclusively to such favored rights. It is proper to instruct a jury that waiver must be proved by this higher standard of proof.

*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.*, 30 Cal.App.4th 54, 61 (1994).

Plaintiffs’ representatives will testify that they did not intentionally relinquish their legal right to pursue their claims against Defendant, and Defendant has no evidence that they did.

#### **10. Estoppel.**

Plaintiffs’ claims are not barred by estoppel: “Four elements are necessary to establish equitable estoppel: (1) the party to be estopped must know the facts (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.” *Quest Software, Inc. v. DirecTV Operations, LLC*, No. SACV 09-1232 AG (ANx), 2011 U.S. Dist. LEXIS 110888, at \*14 (C.D. Cal. Sep. 26, 2011). *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal. App. 4th 54, 59. The party seeking to establish an estoppel must do so by clear and convincing evidence. *In re Marriage of Fell*, 55 Cal.App.4th 1058, 1065 (1997); *In Re Marriage of Brinkman*, 111 Cal.App.4th 1281, 1289 (2003); *Flintkote Co. v. Aviva PLC*, 769 F.3d 215 (3d Cir. 2014) (Requiring proof of equitable estoppel by clear and convincing evidence.”)

There is no evidence that Plaintiffs intended – or acted as if they intended - that their alleged conduct would be relied upon by Defendant. Knowing this to be true, Defendant alleges that Plaintiffs failed to object. While an estoppel may arise from silence where there is a duty to speak (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.*, 71 Cal. App. 4th 1260, 1268 (1999)), Defendant has failed to identify any duty to speak, even if, *arguendo*, Plaintiffs actually knew the wrong was being

1 committed and was actionable. There is no requirement under the IHA that a wronged  
2 stakeholder object or provide notice prior to filing suit.

3 More importantly, Defendant cannot establish reliance on Plaintiffs' alleged  
4 inaction, or that it was damaged as a result. The only "damage" identified by  
5 Defendant is investing in, and growing, the Derby Wars website. But the  
6 uncontradicted evidence is that Defendant acted in reliance on its own belief (and legal  
7 advice) that it was not required to obtain Plaintiffs' consent, nor was it required to be  
8 licensed. There is no evidence that it acted in reliance on Plaintiffs' alleged failure to  
9 object. In fact, when questioned about the legality of its operations by third parties,  
10 Defendant freely shared the written "legal opinions" that it had obtained from its  
11 counsel that its Contests were legal without the consent of Plaintiffs. Defendant relied  
12 on its belief – whether rational or not – that Defendant did not need the consent of the  
13 racetracks to operate its Contests legally, because these were not bets or wagers. It did  
14 not rely on the alleged failure to object of Plaintiffs. "[A] party who asserts estoppel  
15 must not have been misled by his own lack of reasonable care. If he 'conducts himself  
16 with careless indifference to the means of information reasonably at hand or ignores  
17 highly suspicious circumstances, he may not invoke the doctrine of estoppel.'" *Danoff*  
18 *v. United States*, 324 F. Supp. 2d 1086, 1102 (C.D. Cal. 2004)

19 Defendant cannot establish estoppel against Plaintiffs by any standard, much  
20 less by clear and convincing evidence, to this Court.

### 21 **11. Unclean Hands.**

22 "Unclean hands seeks to 'close[] the doors of a court of equity to one tainted  
23 with inequitableness or bad faith relative to the matter in which he seeks relief.'"  
24 *United States v. Wolflick & Simpson*, 2016 U.S. Dist. LEXIS 186359, at \*20 (C.D.  
25 Cal. July 18, 2016).

26 **"To prevail on a defense of unclean hands, a defendant must demonstrate**  
27 **by clear and convincing evidence (1) "that the plaintiff's conduct is inequitable;"**  
28 **and (2) "that the conduct relates to the subject matter of [the plaintiff's] claims."**



1 *Fuddruckers*, 826 F.2d at 847. . . .With respect to the first requirement, "[o]nly a  
2 showing of wrongfulness, willfulness, bad faith, or gross negligence, proved by clear  
3 and convincing evidence, will establish sufficient culpability for invocation of the  
4 doctrine of unclean hands." *Pfizer, Inc. v. Int'l Rectifier Corp.*, 685 F.2d 357, 359 (9th  
5 Cir. 1982). With respect to the second requirement, although "precise similarity"  
6 between the plaintiff's inequitable conduct and the plaintiff's claims is not required, the  
7 misconduct "must be 'relative to the matter in which [the plaintiff] seeks relief.'" *POM*  
8 *Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016).

9 In support of this equitable defense, Defendant claims that:

- 10 • Plaintiffs work with other fantasy sites without requiring payment. (Those  
11 sites are licensed and have Plaintiffs' consent);
- 12 • Santa Anita partnered with Derby Wars on the ShowVivor promotion.  
13 (ShowVivor is a *free* handicapping contest conducted at Santa Anita);
- 14 • Plaintiffs are seeking to gain an unfair competitive advantage over Derby  
15 Wars to purchase or venture with them. (There is no evidence of this.)

16 None of these actions "establish sufficient culpability," nor are they "relative to the  
17 matter in which [Plaintiffs] seek relief."

18 Moreover, Defendant cannot prevail on any of its equitable defenses because  
19 "'he who comes into equity must come with clean hands,' *Hermes Int'l v. Lederer de*  
20 *Paris Fifth Ave., Inc.*, 219 F.3d 104, 107 (2d Cir. 2000) (quoting *Precision Instrument*  
21 *Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 89 L. Ed. 1381, 65 S. Ct. 993  
22 (1945))." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 956 (9th Cir. 2001).

23 The Court has determined that Defendant is subject to the IHA. It is undisputed  
24 that Defendant is not "in strict compliance" with the IHA. Thus, Defendant is in  
25 violation of the *Federal Wire Act*, 18 U.S.C. § 1084, as well as the *Illegal Gambling*  
26 *Business Act of 1970*, 18 U.S.C. § 1955. It is inconceivable that Defendant is entitled  
27 to invoke equity to defeat the Plaintiffs' claims for violation of the IHA and violation  
28 of the UCL, when it is engaged in such conduct.

1                   **12. Proximate Causation.**

2           CACI 430 provides that: “A substantial factor in causing harm is a factor that a  
3 reasonable person would consider to have contributed to the harm. It must be more  
4 than a remote or trivial factor. It does not have to be the only cause of the harm.  
5 Conduct is not a substantial factor in causing harm if the same harm would have  
6 occurred without that conduct.”

7           However, Plaintiffs’ damages are determined by the methods set forth in IHA  
8 Sections 3005 (1) and (2). Thus, under Section 3005(1), “if the interstate off-track  
9 wager was of a type accepted at the host racing association,” Plaintiffs are entitled to  
10 recover the takeout that Plaintiffs would have received had the wagers made through  
11 Derby Wars been placed at Plaintiffs’ respective racetracks. Under Section 3005(2),  
12 “if such interstate off-track wager was of a type not accepted at the host racing  
13 association,” Plaintiffs are entitled to recover Defendant’s actual takeout.

14           Under both provisions, Plaintiffs need not prove that they suffered any harm or  
15 loss due to Defendant’s violation of the IHA. There is no proximate cause  
16 requirement.

17                   **13. No Attorneys’ Fees.**

18           Plaintiffs do not request attorney’s fees in their First Amended Complaint.

19                   **14. No Restitution Or Disgorgement Under Unfair Competition**  
20                   **Law, Cal. Bus. & Prof. Code § 17200 et seq.**

21           Plaintiffs do not seek restitution or disgorgement under the UCL.

22                   **15. Plaintiffs Lack Standing to Seek Injunctive Relief Under**  
23                   **Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et**  
24                   **seq.**

25           The Court has previously ruled that Plaintiffs have standing under the UCL in  
26 denying Defendant’s Motion for Judgment on the Pleadings. Docket, No. 43.

27                   **16. Justified Fair Competition/Lawful Conduct/Conduct Not**  
28                   **Unlawful.**

1 The Court has determined that Defendant's violation of the IHA can serve as the  
2 predicate for a *Business and Professions Code* Section 17200, *et seq.*, claim, "[U]nfair  
3 competition shall mean and include any unlawful, unfair or fraudulent business act or  
4 practice." *Business and Professions Code* Section 17200. "Unlawful business  
5 activity" proscribed under section 17200 includes "anything that can properly be  
6 called a business practice and that at the same time is forbidden by law." *Farmers*  
7 *Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992). "In essence, an action based  
8 on Business and Professions Code section 17200 to redress an unlawful business  
9 practice 'borrows' violations of other laws and treats these violations, when committed  
10 pursuant to business activity, as unlawful practices independently actionable under  
11 section 17200 *et seq.* and subject to the distinct remedies provided thereunder." *Id.*;  
12 See also, *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103  
13 (1996).

14 In addition, the *Federal Wire Act*, 18 U.S.C. § 1084, prohibits the transmission  
15 of wagering information related to wagering on a sporting event or contest across state  
16 lines: "Whoever being engaged in the business of betting or wagering knowingly uses  
17 a wire communication facility for the transmission in interstate or foreign commerce  
18 of bets or wagers or information assisting in the placing of bets or wagers on any  
19 sporting event or contest, or for the transmission of a wire communication which  
20 entitles the recipient to receive money or credit as a result of bets or wagers, or for  
21 information assisting in the placing of bets or wagers, shall be fined under this title or  
22 imprisoned not more than two years, or both."

23  
24 The IHA creates an exception to the prohibition of the *Federal Wire Act* for  
25 wagering on horse racing, but limits that exception to wagering that is in strict  
26 compliance with the IHA: "No person may accept an interstate off-track wager except  
27 as provided in this Act." 15 U.S.C. § 3003. Defendant is in violation of the *Federal*  
28 *Wire Act*, because it accepts interstate off-track wagers related to a sporting event or

1 contest, and is not in strict compliance with the IHA. This violation can also serve as  
2 the predicate for a permanent injunction against Defendant.

3  
4 **17. Injunctive Relief Discretionary.**

5 A permanent injunction should issue when liability is established and there is a  
6 threat of continuing violations. Defendant has continually operated these Contests  
7 since 2011.

8 **18. Right to Plead Additional Affirmative Defenses.**

9 Defendant has not amended its Answer to add any additional affirmative  
10 defenses.

11 **C. Potential Evidentiary Issues/Potential Issues of Law.**

12 Plaintiffs must prove their damages pursuant to IHA Section 3005(1) or  
13 3005(2). The parties have also raised various evidentiary issues and potential issues of  
14 law in their motions *in limine*. In particular, Plaintiffs anticipate that Defendant will  
15 attempt to introduce evidence that is irrelevant to the few issues remaining in this  
16 litigation. As a result, Plaintiffs filed three motions *in limine*:

- 17 • Motion *in limine* No. 1 seeks an Order excluding evidence relating to  
18 Defendant's affirmative defenses other than what was identified and  
19 disclosed in Defendant's Responses to Interrogatories.
- 20 • Motion *in limine* No. 2 seeks an Order excluding any evidence of  
21 Plaintiffs' alleged knowledge of Defendant's Contests prior to January 1,  
22 2013.
- 23 • Motion *in limine* No. 3 seeks an Order excluding any evidence relating to  
24 damages other than as provided by section 3005 of the IHA.

25 All of these motions seeks to exclude evidence that is irrelevant to the issues  
26 remaining for determination. Simply, Plaintiffs damages are pursuant to the formula  
27 set forth in the IHA. Issues of actual harm or offset are irrelevant to that calculation.

28 By their motions *in limine*, Defendant seeks to preclude Plaintiffs from

1 introducing evidence of damages under Section 3005. Defendant also seeks to  
2 preclude Plaintiffs from offering evidence that Defendant's actions violate criminal  
3 statutes (although Defendant claims Plaintiffs must prove unlawfulness in order to  
4 obtain injunctive relief under the UCL). Defendant also seeks to preclude Plaintiffs  
5 from introducing the legal opinions that Defendant relied upon in proceeding to  
6 operate Derby Wars, which is clearly relevant to Defendant's equitable defenses of  
7 estoppel, waiver, and unclean hands.

8 **II. BUFURCATION OF ISSUES/RIGHT TO A JURY TRIAL (LOCAL**  
9 **RULES 16-4.3 AND 16-4.4).**

10 Plaintiffs request that the Court bifurcate the issue of damages which may be  
11 tried to a jury, from the Court trial of the affirmative defenses, and Plaintiffs' request  
12 for injunctive relief. Plaintiffs request that the Court first conduct the trial of the  
13 affirmative defenses, which is a matter to be tried by the Court. If Defendant is  
14 successful in asserting its affirmative defenses, then there will be need for a trial of  
15 Plaintiffs' damages. Moreover, there are no overlapping issues.

16 Whether Defendant's equitable affirmative defenses bar Plaintiffs' claims is an  
17 issue for the Court. There is no right to a jury trial on equitable defenses. See *Danjaq*  
18 *LLC v. Sony Corp.*, 263 F.3d 942, 962 (9th Cir. 2001). The Court must also decide  
19 issues relating to equitable relief, such as Plaintiffs' request for an injunction. *Tull v.*  
20 *United States*, 481 U.S. 412, 417 (1987).

21 Where the legal and equitable claims do not involve common issues, the order  
22 of trial is discretionary with the trial judge. *Granite State Ins. Co. v. Smart Modular*  
23 *Technologies, Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996) (equitable estoppel affirmative  
24 defense did not involve same issues as breach of contract and negligence claims);  
25 *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 419 (9th Cir.  
26 1998) (equitable rescission claim tried first where no issues common to breach of  
27 contract and breach of covenant of good and fair dealing claims).

1 Because Defendant asserts that its affirmative defenses would bar Plaintiffs'  
2 claims in total, and eliminate the need for any trial on damages, and because there are  
3 not common issues, the Court should first hear and rule upon Defendant's affirmative  
4 defenses. The Court should also hear Plaintiffs' claim for injunctive relief in the first  
5 phase of the trial.

6 **III. ATTORNEYS' FEES (LOCAL RULE 16-4.5).**

7 Plaintiffs do not claim that attorney's fees are recoverable, and dispute  
8 Defendant's prayer for an award of attorney's fees in its Answer.

9 **IV. CONCLUSION.**

10 The scope of this trial has now been greatly limited by the Court's Order  
11 Granting in part Plaintiffs' Motion for Partial Summary Judgment:

12 "Having determined that Derby Wars entry fees constitute a wager,  
13 where such wagers are placed with Derby Wars in Kentucky, with  
14 respect to the outcome of a horserace, or series of up to six individual  
15 horseraces, as the case may be, taking place in California, Oregon,  
16 Maryland, and/or Florida, and where such wagers are received over the  
17 internet, the Court concludes that Defendants are operating an off-track  
18 betting system subject to the Interstate Horseracing Act. *See* 15 U.S.C. §  
3002(7). As such, the Court **GRANTS** Plaintiffs' Motion for Partial  
Summary Judgment as to their IHA claim.

19 ...

20 "The Court finds: the entry fees paid in contests offered by Defendant on  
21 its Derby Wars website are wagers under the Interstate Horseracing Act  
22 of 1978; Defendant is operating an off-track betting system as defined in  
23 Section 3002(7) of the IHA; and the IHA can serve as a predicate for a  
24 California Business and Professions Code Section 17200 claim."  
Docket, No. 88.

25 The only issues remaining are: Defendant's affirmative defenses to be tried by the  
26 Court; the issuance of a permanent injunction to be tried by the Court; and Plaintiffs'  
27 damages. Plaintiffs respectfully request that the Court bifurcate the trial so that  
28 Defendant's equitable defenses are tried first to the Court, along with Plaintiffs' right

1 to a permanent injunction, followed by the jury trial to determine Plaintiffs' damages,  
2 if necessary after the first phase.  
3  
4

5 DATED: May 26, 2017

Respectfully submitted,

6 CORBETT, STEELMAN & SPECTER  
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